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No. 04-1409

Supreme Court, U.S.
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In the
Supreme Court of the United States

STEUBENVILLE CITY SCHOOLS; RICHARD LUCCI; DANIEL SPAHN; RUTH ANN BRUZZESE; WILLIAM KERR; WILLIAM HENDRICKS; RICHARD BEAL,

Petitioners,

v.

PATRICK BARRETT,

Respondent.

On Petition for a Writ of Certioriari to the United States Court of Appeals for the Sixth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORIARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding that Petitioner Superintendent Richard Lucci was not entitled to qualified immunity as to Respondent Patrick Barrett's claim brought under 42 U.S.C. § 1983 alleging denial of a constitutional right to parental control over his son's education. The Sixth Circuit determined that the Respondent alleged a violation of a constitutionally protected right and that that right was clearly established such that a reasonable government official would have realized that denying a promotion and/or terminating an employee for exercise of that right would be a violation. The Petition raises the following issues:

I. WERE THE CONSTITUTIONAL RIGHTS AT ISSUE CLEARLY ESTABLISHED SUCH THAT A REASONABLE PERSON WOULD HAVE KNOWN OF A VIOLATION OR WAS A COMPLICATED ANALYSIS REQUIRED AS PETITIONERS SUGGEST?

II. IS THERE A CONFLICT IN THE CIRCUITS WHERE THE FIFTH AND THE ELEVENTH CIRCUIT CASES INVOLVED WEIGHING EACH PARTY'S EVIDENCE TO DETERMINE LIABILITY IN TRIALS ON THE MERITS (OR A REVIEW OF FINDINGS ON THE MERITS) AND THIS SIXTH CIRCUIT CASE WHERE THE COURT COULD NOT WEIGH EVIDENCE FOR PURPOSES OF SUMMARY JUDGMENT?

III. SHOULD THE COURT HAVE ANALYZED PETITIONER SCHOOL DISTRICT'S INTEREST IN A MANDATORY ENROLLMENT POLICY WHERE PETITIONERS OFFERED NO EVIDENCE OF ITS EXISTENCE?

IV. DID PETITIONERS CLAIM AND ESTABISH UNDUE PREJUDICE REGARDING THEIR NOTICE OF RESPONDENT'S CONSTITUTIONAL CLAIM OF A RIGHT TO PARENTAL CONTROL?

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OPINION BELOW

Respondent Patrick Barrett was an Elementary School Teacher for Petitioners Steubenville City Schools. The Superintendent of the schools was Petitioner Richard Lucci and the Board Members of the District were Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks, and Richard Beal. Respondent maintains that Petitioners took adverse employment action against him in the form of denying him a promotion from a full-time substitute teaching position to a permanent full-time teaching position and terminated him from his full-time substitute teaching position. Respondent maintains that these adverse employment actions were taken against him because he chose to enroll his son in a Catholic school. He maintains that Petitioner Lucci attempted to coerce him to enroll his son in the Steubenville City Schools.

STATEMENT OF JURISDICTION

This Court should not invoke jurisdiction under 28 U.S.C. §1254 and Supreme Court Rules 10 (a) and (c) because the United States Court of Appeals for the Sixth Circuit has not entered a decision in conflict with any other Circuits and neither has the Sixth Circuit decided an important federal question in conflict with relevant decisions of this Court.

The Sixth Circuit's decision was issued on November 15, 2004. Petitioners sought a re-hearing *en banc* before the Sixth Circuit. The Petition for re-hearing *en banc* was denied on January 18, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Fourteenth Amendment, § 1 states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,

and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Procedural History.

On May 21, 2001, the Respondent brought suit in the United States District Court for the Southern District of Ohio. The Respondent alleged that he was discriminated under Title VII, 42 U.S.C. section 2000e et. seq. and that his civil rights were violated under 42 U.S.C. section 1983 based upon his termination and denial of a permanent teaching position because he disenrolled his son from the Petitioners' public school system and enrolled him in a private Catholic school. Petitioners filed their Motion for Summary Judgment on December 4, 2002. Respondent filed his Memorandum in opposition on January 13, 2003, a Motion to Supplement that Memorandum Contra with an Affidavit on January 30, 2003 and subsequently filed an amended response to his Memorandum Contra on January 30, 2003. Petitioners filed a Motion to Strike portions of Respondent's Response to Motion for Summary Judgment on February 3, 2003. Petitioners also filed their Reply to Respondent's Response opposing Summary Judgment

on February 3, 2003. Respondent Barrett filed a Response to the Motion to Strike on February 18, 2003. On March 4, 2003, Petitioners filed a Reply to Respondent's opposition to the Motion to Strike. On September 11, 2003 the Court issued an Order granting Petitioners summary judgment as to the Respondent's federal and state claims of religious discrimination, Respondent's claim of equal protection and free exercise of religion under 42 U.S.C. section 1983 and denied Petitioners' Summary Judgment Motion as to Respondent's section 1983 parental rights claim and remaining state law claims. Petitioners filed their Notice of Interlocutory Appeal on October 10, 2003. The appeal was denied by the Sixth Circuit on November 15, 2004. That decision was published as *Barrett v. Steubenville City Schools, et al.,* 388 F.3d 967 (6th Cir. 2004). *En banc* review was denied on January 18, 2005. Petitioners filed their Petition for Writ of Certiorari on April 15, 2005.

B. Factual Record.

This case involves Respondent Patrick Barrett who was a substitute teacher with Petitioner Steubenville City Schools. He taught at the elementary school level. He obtained his teaching certificate in elementary education in 1997 as well as his Bachelor's Degree in education in 1997 and his Master's Degree in Elementary Education in 2001. Petitioner Steubenville is the public school system of Steubenville, Ohio. It offers no religious instruction. In November 1998, after being laid off from Weirton Steel where he had been a pipefitter and welder, Respondent was hired to be a substitute teacher at Steubenville City Schools. After performing well, he was hired to be a long-term substitute teacher at Wells Elementary School with Petitioner Steubenville City Schools in January 1999, teaching the first grade. He filled in for the teacher who went on maternity leave. The period was initially for six

weeks, however, it turned into eight weeks because the teacher required additional time off. Mr. John Holub, Principal at Wells Elementary, asked the Respondent if he was interested in remaining on for the entire school year for a fourth grade teacher who had also taken a year off for maternity leave. Mr. Holub told the Respondent that Superintendent Charles Joyce[1] was happy with Mr. Barrett's job performance and asked if he would accept the fourth grade position. Mr. Barrett accepted the assignment with the hopes of receiving a full-time contract for the following school year.

In May 1999, the Respondent was to be interviewed for a full-time contract teaching position with Petitioner Steubenville. He spoke with Mr. Holub prior to that interview who told him that Mr. Lucci, who was then Assistant Superintendent but who would be taking over as Superintendent, would ask him about his son, Tyler, and where his son was attending school. Mr. Holub told Mr. Barrett that Mr. Lucci would not give him a contract unless his son attended Steubenville City Schools. Tyler Barrett, in the eighth grade at the time, was attending All Saints, a Catholic school. He had attended that School since Kindergarten. Tyler was considering becoming a priest. Mr. Barrett was indeed subsequently interviewed by three administrators, Superintendent Dr. Joyce, Anne Stevenson and Assistant Superintendent Richard Lucci. Dr. Joyce and Anne Stevenson asked Mr. Barrett about his education and experience and commended him for the good job he was doing at Wells Elementary. However, Petitioner Lucci asked him straight out about where his son would be attending school for the next school year. Mr. Barrett replied that his son was to finish his eighth grade year at All Saints, the School that he had been attending since kindergarten. Subsequent to the interview, Mr. Holub told Mr. Barrett that all three of the administrators were impressed with him however, Mr. Lucci did not like the fact that he was sending his son

[1] Superintendent Joyce preceded Petitioner Lucci as Superintendent.

to a Catholic school. Mr. Holub also indicated that Petitioner Lucci, who would be taking over as Superintendent at the beginning of the 1999-2000 school year (the school year for which Mr. Barrett had just interviewed for) would not give Mr. Barrett a contract until he moved his son out of the Catholic school and into the Steubenville City Schools.

During that summer, after Petitioner Lucci officially took over as Superintendent, two openings occurred for teaching positions. The Respondent received consideration for neither. Two weeks before school began, Petitioner Lucci hired a teacher to teach second grade who had never substituted before. It was traditionally the case that the School District would hire persons who had previously substituted within the District itself. Also, during an August 1999 interview with Superintendent Lucci, the Respondent informed him that Weirton Steel had recalled him back to work and that he needed to make a decision. He asked Petitioner Lucci for a full-time teaching contract with Steubenville City Schools. Mr. Lucci told Mr. Barrett that, "You have a future here." He also told him that, "I could not promise you a job because I may not be here next year, and I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." As a result of this promise to Mr. Barrett, Mr. Barrett declined to return to the full-time position at Weirton Steel and elected to put in another year as a substitute teacher with the thought that Mr. Lucci would award him a full-time teaching contract if he were still Superintendent at the time.

Mr. Barrett remained as a teacher at Wells Elementary as a long-term substitute teacher for the 1999-2000 school year. During that school year, he was often told that Petitioner Superintendent Lucci did not like where his son was attending school. In May 2000, John Holub, still Principal at Wells, informed the Respondent

that he would never receive a contract to teach full-time until he moved his son to Steubenville City Schools. Teacher Elizabeth Shenefield overheard this conversation and told Mr. Holub that the School District could not do that to Mr. Barrett, that it was illegal.

Petitioner Steubenville City Schools had a policy or practice of granting full-time contracts for teachers who taught for sixty days in the same classroom. On occasion, a teacher would be removed on the fifty-ninth day so as to avoid granting that teacher a full-time contract. Near the end of the 1999-2000 school year, when it was clear that Mr. Barrett would not place his son in Steubenville City Schools, Petitioner Lucci removed him from the classroom for three days, so that he could not get his sixty days in. Hence, he did not receive a full-time teaching contract as he had been promised. Also in May 2000, Respondent Barrett had a conversation with Superintendent Lucci. Superintendent Lucci told him that he should consider moving his son to the public school for at least one year, and he insisted that Tyler, his son, would like it. Now, under pressure to place his son in the Steubenville City School District, after having turned down the opening at Weirton, Respondent Barrett, under duress, enrolled his son in the Steubenville High School (known locally as "Big Red"). In June 2000, a full-time teaching contract was issued to another teacher and not to Respondent Barrett. Respondent Barrett learned in July of 2000 that additional positions were being filled at the School District. These positions were offered to persons, many of whom had not substituted in the School District.

In August 2000, Respondent Barrett again went to speak to Petitioner Superintendent Lucci about the situation. Petitioner Lucci immediately asked him how his son felt about attending Big Red. Mr. Barrett informed Mr. Lucci that his son was not happy. Mr. Lucci replied that he would get used to it. Mr. Barrett then

asked Mr. Lucci if, hypothetically, Tyler did not actually attend Big Red if it would be held against him [Respondent]. Mr. Lucci replied that indeed it would be held against him. Mr. Lucci then told him that if no other positions were open, even though it was going to "cost" him, that if Mr. Barrett returned as a long-term substitute, that this time, he would let him get his sixty days in so that he could receive a full-time teaching contract. He expressly told him that he would have a contract after his sixtieth day.

A new position in fact did open up a couple of weeks after the school year started. The Respondent attempted to communicate with Petitioner Lucci about this position. Finally, he did reach Mr. Lucci and he inquired about the open position. Mr. Lucci insisted that he was not going to fill this opening, but that the earlier agreement he had, to get the full sixty days in, was still in effect.

By this time, even though Mr. Barrett had enrolled Tyler in Steubenville High School, because his son had given him such serious opposition to attending the public high school, Mr. Barrett reconsidered his decision and disenrolled him. He re-enrolled him in Catholic Central High School. Mr. Holub left Wells as Principal and Melinda Young began as Principal of Wells in late August of 2000. One day before Mr. Barrett was to open his classroom at Wells, Mrs. Young came to him and asked him about his son. She said that Mr. Lucci would give him his contract if he sent Tyler to Big Red. Mr. Barrett told Mrs. Young to stay out of the matter and that where he sent his son was his own business.

On September 29, 2000, during the school day, Mrs. Young told the Respondent to report to Petitioner Superintendent Lucci's office. Upon arriving there, the Respondent met with Petitioner Lucci and Assistant Superintendent Richard Renallo. Petitioner Lucci, in an angry voice, told Mr. Barrett that he was being

removed from his position as a fourth grade substitute teacher at Wells Elementary. When Mr. Barrett inquired as to why, Lucci told him that he was being disloyal. Mr. Barrett asked how could he be disloyal when he had worked in the school district for 2 ½ years as a substitute. Lucci replied that he was being disloyal to him [Lucci]. Mr. Barrett reminded him of his agreement to grant him a contract after sixty days of teaching in the classroom. Petitioner Lucci, irate at this point, shouted that he never promised him a contract after sixty days. Lucci ordered him to clean out his classroom that very day. Mr. Barrett asked Mr. Lucci why did he always bring up his son during their conversations together. Lucci said that he thinks that the public high school would be better for his son. Mr. Barrett insisted that his son's school attendance was his responsibility and inquired as to why his loyalty and hard work given to the School District during this long time period, and the fact that he gave up a job with Weirton Steel were not indicative of loyalty, as opposed to where he sent his son to school. Mr. Lucci ignored this question.

Subsequent to the Respondent's dismissal from his fourth grade substitute teaching class, several of the parents of the children he had been teaching distributed a petition protesting the School Board's refusal to hire the Respondent as a permanent teacher. They were upset with the fact that he had been denied a position on "pretty unfortunate" grounds. In addition, subsequent to his dismissal as a long-term substitute for the fourth grade class at Wells and ultimate denial of a permanent teaching contract with the District, Mr. Barrett received favorable reference letters from John Holub. The Petitioners subsequently maintained that the Respondent was pulled from his fourth grade classroom in September/October 2000 because of his poor work performance and complaints about participating in a reading program.

SUMMARY OF ARGUMENT

Petitioner alleged that: (a) there was a conflict in the Circuits created by the Sixth Circuit's non-use of a balancing test in reaching its decision on qualified immunity; (b) Petitioner Lucci was required to be knowledgeable of two complicated constitutional principles and engage in a complex balancing test which could not have placed him on notice that his conduct would be unlawful; and (c) a constitutional violation was not alleged where the right was not asserted in a Complaint and only a passing reference was made in the Respondent's Reply Brief in Opposition to a Motion for Summary Judgment.

As to the argument regarding a conflict, Respondent maintains that there is no conflict between the Circuits. The Sixth Circuit did not utilize a balancing test in the Respondent's case because the question of qualified immunity for summary judgment purposes was being analyzed. In that situation, the factual assertions and inferences therefrom of the non-moving party are taken as true while the facts and inferences of the moving party are not considered.

As to the need to balance constitutional principles, the rights at issue in this case were clearly established by both precedent from this Court as well as from the Sixth Circuit. No case has held, in either the Fifth, Sixth or Eleventh Circuits, that a public employee may be terminated or denied a promotion because of where they elected to enroll their child in school.

Lastly, the Petitioners were clearly on notice of the right to parental control asserted by the Respondent because they referred to it in their own Motion for Summary Judgment, the Respondent referred to it clearly in his Memorandum Contra to that Motion for

Summary Judgment, and Petitioners replied to the argument in their Reply Brief. Moreover, Petitioners do not claim any form of prejudice nor have they shown any prejudice from any alleged lack of notice of the constitutional claim.

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE CONSTITUTIONAL RIGHTS AT ISSUE WERE CLEARLY ESTABLISHED SUCH THAT A REASONABLE PERSON WOULD HAVE KNOWN OF A VIOLATION.

Petitioners maintain that the constitutional right at issue had not been articulated in the Sixth Circuit. The District Court relied on cases outside of the Sixth Circuit in reaching its conclusion. However, the Sixth Circuit held that it did not need to rely on the District Court Opinion in its analysis. The Court noted that the cases referenced by the District Court pointed unmistakably to the unconstitutionality of the conduct and were clearly foreshadowed by direct applicable authority in the Supreme Court. *Barrett v. Steubenville City Schools*, 388 F.3d 967 (6th Cir. 2004), Appendix A, 8a-9a. However, while indicating that it was permissible for the District Court to rely on those cases in finding that the law was clearly established, the Sixth Circuit believed that it was unnecessary to do so. As a result, the Sixth Circuit relied upon Supreme Court and Sixth Circuit authority for finding that the right was clearly established. The Circuit Court may affirm a decision of the District Court if correct for any reason, including one not considered below. *U.S. Postal Service v. National Association of Letter Carriers, AFL-CIO*, 330 F.3d 747, 750 (6th Cir. 2003).

The Sixth Circuit held on page 6 of its Opinion that the right of a parent to direct the education of his or her child was clearly

established by United States Supreme Court precedent. Appendix A, 6a-7a. In addition, it was clearly established by United States Supreme Court precedent that it was unlawful to terminate a public employee solely on the basis of that employee's exercise of a constitutional right. The Court noted that the United States Supreme Court and the Sixth Circuit have repeatedly recognized that parents have a fundamental right to raise their children, including directing their children's education. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390, 400, 43 S. Ct. 625, 67 L.Ed.2d 1042 (1923) (recognizing the right of "the parent to give his [or her] children education suitable to their station in life"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L.Ed. 1070 (1925) (striking down state law that required parents to send their children to a public school for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Zelman v. Simmon-Harris*, 536 U.S. 639, 680, n.5, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring) (emphasizing that "[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"); *Ohio Ass'n. of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (recognizing that because parents have a constitutional right to "direct their children's education," organization has standing to bring claim on behalf of parents); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002) (stressing that "[b]oth Supreme Court precedent and our national tradition suggests that a family member's right to participate in child-rearing and education is one of the most basic and important associational rights protected by the Constitution"); *Runyon v. McCrary*, 427 U.S. 160, 178, 427 U.S. 160, 96 S. Ct. 2586, 49

L.Ed.2d 415 (1976) ("parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction..."). This line of cases clearly establish the Respondent's right to send his son to a Catholic school.

The cases cited as supporting the principle that it is unlawful to engage in adverse action toward a public employee solely due to that employee's exercise of his or her constitutional rights are as follows: *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972) (finding unconstitutional the non-renewal of a teaching contract on the basis of a teacher's exercise of a constitutionally protected interest); *Littlejohn v. Rose*, 768 F.2d 765, 769-70 (6th Cir. 1985) (finding that the refusal to rehire a non-tenured teacher violated the constitutionally protected right of privacy if such denial was based on the teacher's divorce); *Adkins v. Board of Education of Magoffin Co., Kentucky*, 982 F.2d 952 (6th Cir. 1993) (court overrules a motion to dismiss and found error in the lower court's grant of said motion where the plaintiff was denied employment with a school board simply because of her marriage to a person who the employer disliked); and *Montgomery v. Carr*, 101 F.3d 1117, 1127 (6th Cir. 1996) (finding that if the only motivation for a public official taking some adverse action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional). Thus, the denial of public employment based solely upon the Respondent's exercise of his right to educate his son in a Catholic school was clearly foreshadowed by United States Supreme Court and Sixth Circuit precedent giving notice to Petitioner Superintendent Lucci that his actions were illegal.

As to Petitioners' argument that there was insufficient notice because the right at issue was not specific, the Court noted that "the

Supreme Court has instructed that qualified immunity does not require '*the very action in question* [to] ha[ve] previously been held unlawful,' but rather '*in the light of the pre-existing law* the unlawfulness must be apparent'." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Furthermore, the Court added:

> Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to [send] his child to a private school. (*sic*).

Appendix B, 10a.

Hence, the very precedent cited by Petitioners actually supports the notion that Superintendent Lucci should have known that his actions were illegal. No two reasonable superintendents of public school systems could agree that the action taken by Petitioner Superintendent Lucci would be lawful. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed.2d 271 (1986). There is no support for the precision in legal authority that the Petitioners advocate.

Petitioners cannot argue that no Sixth Circuit case exists that specifically enunciates that a public school official cannot deny someone employment solely because that person chooses to send their child to a private school. *See, Janes v. Bardstown City School Board of Educ.*, 97 F.3d 1452, 1996 WL 536794 (6th Cir. September 20, 1996) (Appendix B) (genuine issue of material fact existed with regard to claim of unconstitutional refusal to hire teacher because she enrolled her children in parochial schools). Although *Janes* is unpublished, a party may cite an unpublished

disposition in relation to a material issue in a case where there is no published opinion on point. An unpublished case can have persuasive value. *Baer v. R&F Coal Co.* 782 F.2d 600 (6th Cir. 1986). It can also have limited precedential value. *McMeans v. Brigano*, 228 F.3d 674 (6th Cir. 2000). Even though Petitioners attempt to minimize the weight of this authority because it was an unpublished decision, it was persuasive because it relied upon Supreme Court and Sixth Circuit cases and in addition, the same authorities were cited in the decisions from the Fifth and Eleventh Circuits. All courts found the existence of the constitutional rights in question.

Petitioners' citation to *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L.Ed.2d. 818 (1999) is misplaced. In relying on this case, Petitioners argue that there are no two judicial opinions holding the practice in question to be unlawful. On the contrary, there are no opinions holding that the constitutional rights do not exist. Qualified immunity was not granted in any case cited by Petitioners. The right to educate one's child and not be subject to adverse employment action for doing so was clearly established in each of the cases cited by the Petitioners. There was some authority where that constitutional right was outweighed by a governmental interest as in the *Kelley* case, *supra*. However, that case was decided on the merits and was not at the summary judgment stage as Respondent Barrett's case was. On the other hand, there are several judicial opinions holding that conduct similar to Petitioner Lucci's was unlawful. None of these cases resulted in summary judgment for the employer. In sum, the rights at issue were clearly established such that a reasonable person would know that a promotion denial and/or a termination would be a constitutional violation. Petitioners' arguments to the contrary are meritless.

II. THERE WAS NO CONFLICT IN THE CIRCUITS BECAUSE THE FIFTH AND THE ELEVENTH CIRCUIT CASES INVOLVED WEIGHING EACH PARTY'S EVIDENCE TO DETERMINE LIABILITY IN TRIALS ON THE MERITS (OR A REVIEW OF FINDINGS ON THE MERITS) WHILE THE SIXTH CIRCUIT COULD NOT WEIGH EVIDENCE FOR PURPOSES OF SUMMARY JUDGMENT.

Petitioners allege that the Sixth Circuit did not engage in a balancing test in which the constitutional rights at stake are weighed against the state's interest, here, presumably, in pursuing its educational mission. However, Petitioners fail to note that at issue was whether or not summary judgment should be granted on the Respondent's claims: The District Court denied summary judgment and in doing so was obligated to weigh all inferences in favor of the Respondent and resolve any factual disputes in favor of the Respondent as well. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It was not a trial on the merits.

Petitioners argue that a balancing test has been used in the Fifth and Eleventh Circuits. This argument obfuscates the difference between the standards to be used at the summary judgment phase of a lawsuit and that to be used in a trial or hearing on the merits. As the Federal Rules of Civil Procedure state, and as this Court has reiterated in the case of *Reeves v. Sanderson*, 530 U.S. 133, 150, 120 S. Ct. 2098, 147 L.Ed.2d. 105 (2000), at the summary judgment phase, all inferences and factual disputes are to be resolved in the non-movant's favor. In this case, the Respondent claimed that he was terminated and denied a position to a full-time teaching position because he elected to send his son to a Catholic school. Petitioners disagree and assert that the Respondent's work

performance caused his removal from his full-time substitute teaching position and that financial considerations prevented his promotion to a full-time permanent teaching position. For purposes of summary judgment, the Court was not in a position to resolve this factual dispute. *Id.* The Court had to view the facts in the Respondent's favor and had to disregard all evidence favorable to the Petitioners for purposes of summary judgment. On the other hand, the balancing test cited by Petitioners would only be necessary in a trial on the merits or where an appellate court is assessing the evidence offered at trial. The case of *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), was a case where the court was asked to determine, on the merits, whether or not an anti-nepotism policy which required the transfer of a public school teacher was unconstitutional.[2]

There was no obligation for the Court to engage in a balancing test to determine whether or not a constitutional right is clearly established for purposes of determining the existence of qualified immunity. Qualified immunity is an affirmative defense that shields government officials forming discretionary functions from liability for civil damages provided that their conduct does not violate clearly established constitutional or statutory rights which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). On appeal, in viewing the facts in favor of the non-moving party for assessing summary judgment, the Court must decide whether a right was clearly established and whether a constitutional violation occurred.

To determine whether or not a right was clearly established such that a reasonable person would have known does not

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[2] The *Montgomery* case was relied upon by the dissent in the Sixth Circuit Opinion. Petitioners have heavily relied upon the position advanced in the Sixth Circuit dissent.

necessarily involve a "complex" balancing test as the Petitioners state. This argument completely misconstrues constitutional jurisprudence in the area of qualified immunity that has been established for over twenty years. The cases cited by the Petitioners only highlight the fact that the Courts have used a balancing test to either determine the merits *sua sponte* or to review the merits determination of the lower court. *Pickering v. Board of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563, 580, 88 S. Ct. 1731, 1740 (1968) (state court failed to examine evidence *de novo* and as a result the Supreme Court examined the evidence completely independently and afforded little weight to the factual determinations made previously); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990) (reviewing on appeal a trial court verdict; balancing test discussed in the context of determining if defendant employer produced any evidence of a state interest in promoting the efficiency of the school system); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985) (appellate court review of district court findings of fact); *Stough v. Crenshaw Country Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984) (appellate court review of a bench trial which assessed the conflicting interests between the constitutional right and the state asserted interest); *Kelley v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed.2d. 708 (1976) (Testimony was taken by the trial court and there was appellate review of the trial court determination on the merits); *O'Hare Trucking Serv., Inc. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353, 135 L.Ed.2d. 834 (1996)[3] (qualified immunity was not an issue, hence whether or not the right was clearly established was not an issue). Thus, a careful analysis reveals that there is no conflict in the Circuits.

[3] The discussion of governmental interests in *O'Hare* was done only to resolve an express conflict in the Circuits over the question of whether independent contractors had the same protection as public employees from termination for refusing to support a political party or its candidates unless political affiliation was a reasonable and appropriate requirement for the job in question.

III. THE COURT NEED NOT HAVE ANALYZED AN INTEREST IN A MANDATORY ENROLLMENT POLICY WHERE THE PETITIONERS DENY SUCH A POLICY EXISTED.

Petitioners never argued in the trial court litigation that there was a valid governmental interest in a mandatory enrollment policy and that such was the reason for the adverse action taken toward the Respondent. Petitioners, at all times, denied ever terminating the Respondent because he elected to send his son to a Catholic school. J.A. 59, 97, ¶ 4, 5; 98, ¶ 8-10. Having never claimed to have specifically denied employment to the Respondent because he sent his son to a Catholic School, Petitioners cannot now claim that in fact they did deny employment on this basis and that there was a governmental interest that outweighed the Respondent's assertion of his constitutional rights. J.A. 231. Petitioners discuss at length the various balancing tests of state interests involved in prior cases before this Court and the Sixth Circuit. However, where there has been no basis in the record below to assert such interests, such arguments should not be entertained by this Court. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569, 81 L.Ed. 755 (1937).

Even if there were a governmental interest in a mandatory enrollment policy asserted by Petitioners that should be analyzed as a possible substantial factor in the adverse employment actions taken toward the Respondent, there would be, in any case, issues of material fact as to whether the unconstitutional reason was the substantial factor for the adverse actions. This is because Respondent claimed that an unconstitutional abridgement was the substantial factor in the adverse actions. The two positions needed to be weighed by a trier of fact. Where there are genuine issues of material fact, summary judgment must be denied. Fed. R. Civ.

Proc. 56(c). Thus, even under the "balancing test" scenario offered by Petitioners, summary judgment would be properly denied.

IV. PETITIONERS DID NOT CLAIM NOR ESTABLISH UNDUE PREJUDICE REGARDING THEIR NOTICE OF RESPONDENT'S CONSTITUTIONAL CLAIM OF A RIGHT TO PARENTAL CONTROL.

Petitioners claim that no right to parental control was specifically pled in the Respondent's Complaint. Interestingly enough, Petitioners do not claim any form of prejudice resulting therefrom. Petitioners seem to take umbrage regarding the Court's recognition of the claim. However, undue prejudice is the standard that must be met, not umbrage. *Foman v. Davis*, 371 U.S. 178, 181-182, 192, 83 S. Ct. 227, 230 (1962).

This Court has stated that it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. The Rules themselves provide that they are to be construed to secure the just, speedy, and inexpensive determination of every action. Fed. R. Civ. Proc. 1. The real issue is whether or not there was surprise to the Petitioners so as to unduly prejudice their opportunity to respond to the constitutional claim raised. No such prejudice was argued nor shown by Petitioners. In fact, Petitioners specifically addressed the constitutional claim in their Motion for Summary Judgment. J.A. 60, n.7. Respondent then rebutted that position in his Memorandum Contra to the Motion for Summary Judgment. *Id.* 135-139. Petitioners then responded in their Reply Brief. *Id.* 234. No motion for a more definite statement had ever been filed in the case and no motion to reopen discovery was presented.

Courts have consistently held that pleadings are to be liberally construed. *Ellis v. Dyson*, 421 U.S. 426, 95 S. Ct. 1691, 44 L.Ed.2d 274 (1975). The Respondent maintains that the Complaint in and of itself could be liberally construed to include a right of parental control. The First claim for Relief states: "Violation of Civil Rights, 42 U.S.C. 1983." Then in paragraph 8, of the Complaint, it is alleged that: "Plaintiff was denied a full-time position with Defendant Steubenville because his son, Tyler Bennett was enrolled in a Catholic school." J.A. 9.

Even if the Complaint itself was insufficient, the Respondent clarified the claim. Petitioners relied on *Spadafore v. Gardner*, 330 F.3d 849, 853, in support of their position. The Sixth Circuit in Mr. Barrett's case expressly noted that unlike the plaintiffs in *Spadafore*, Respondent Barrett expounded upon his claim in his response to Defendants' Motion for Summary Judgment. The Court specifically noted that the first argument heading in Respondent's Memorandum Contra was entitled: "Material Issues of Fact Exist as to Plaintiff's §1983 Claim of Infringement of his Fundamental Right in the Rearing of his Child..." J.A. at 135. As a result, the Court found that the Respondent did sufficiently state a claim.

In none of the cases cited by the Petitioners had there been a subsequent clarification by the plaintiff(s) of the actual claims being brought. The *Spadafore* case was already referenced. Similarly, in the Petitioners' cites of *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003); *Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998); and *Webster v. Reproductive Health Services*, 492 U.S. 490, 512, 106 L. Ed.2d 410, 109 S. Ct. 3040 (1989), there was no subsequent clarification of the constitutional right at issue as there was in the case at bar. Petitioners' arguments should fail.

CONCLUSION

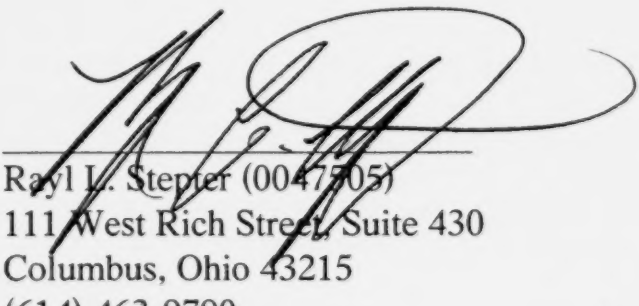
This case does not involve any questions of exceptional importance. Petitioners did not raise a single governmental interest in support of their adverse employment actions. They deny taking any adverse employment actions because the Respondent wanted his son to attend a Catholic school. Instead, Petitioners alleged that the Respondent was never terminated, was denied a full-time permanent teaching position due to the School District's financial position, and was removed from his full-time substitute teaching position for work performance reasons. J.A. 59; 97, ¶ 4, 5; 98, ¶ 8-10. It is only now, when seeking to petition their case before this Court, that there is discussion of an alleged governmental interest. Because there was no governmental interest claimed in the trial court proceedings, there was no need for the Court to address or discuss a balancing test.

Secondly, there is no conflict between the Circuits. For the very same reasons cited above, the Sixth Circuit had no need to apply a balancing test. Petitioners have created an illusory conflict in order to justify having their case heard before this Court. Petitioner Lucci was on notice that taking an adverse employment action against a public school teacher because he elected to place his son in a Catholic school was illegal because both the right to educate one's child was clearly established and the illegality of terminating a public employee solely because of his or her exercise of a constitutional right was clearly established as well. These two legal principles clearly foreshadowed and established the further legal principle that terminating (or committing other adverse employment action against) a teacher solely because he exercised his constitutional right to send his son to a Catholic school was illegal. Thus qualified immunity is not available. In the *Janes* case, *supra*, as well as the *Stough* and *Fyfe* cases, *supra*, it was

established that a teacher may not be the recipient of an adverse employment action solely because of the exercise of his or her constitutional right to direct the education of their son or daughter.

Lastly, Petitioners never claimed prejudice before and do not claim prejudice now regarding an alleged lack of Respondent's claim of violation of his right to raise his son. Petitioners were clearly on notice that a right to parental control was at issue in the Respondent's lawsuit. The right may be inferred from the Complaint that was filed. The Petitioners also anticipated that the right was being claimed and argued that there were no material issues of fact in support of the claim in their Motion for Summary Judgment. Respondent argued the parental claim in his Memorandum Contra opposing summary judgment, and Petitioners filed a rebuttal in their Reply Brief. As such, there was no undue prejudice to the Petitioners pertaining to the claim brought before the Court. As such, on all accounts, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals
Sixth Circuit

PATRICK BARRETT,

Plaintiff-Appellee,

v.

STEUBENVILLE CITY SCHOOLS,
Richard Lucci, in his individual capacity only,
Daniel Spahn, in his official capacity only,
Ruth Ann Bruzzese, in her official capacity only,
William Kerr, in his official capacity only,
William Hendricks, in his official capacity only,
and Richard Beal, in his official capacity only,

Defendants-Appellants.

No. 03-4373.

Submitted: Aug. 11, 2004.
Decided and Filed: Nov. 15, 2004.
Rehearing En Banc Denied Jan. 18, 2005.

Before: KEITH, MARTIN, and ROGERS, Circuit Judges.

KEITH, J., delivered the opinion of the court, in which MARTIN, J., joined. ROGERS, J. (pp. 974-76), delivered a separate dissenting opinion.

OPINION

KEITH, Circuit Judge.

Defendants-Appellants Steubenville City Schools, Superintendent Richard Lucci, in his individual capacity only, and Board Members,

Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks, and Richard Beal, in their official capacities only, appeal the district court's denial of qualified immunity in this action claiming a deprivation of plaintiff's First and Fourteenth Amendment rights in defendants' failure to offer plaintiff a permanent teaching position. For the reasons that follow, we AFFIRM the district court's decision.

I. BACKGROUND

Plaintiff-Appellee, Patrick Barrett ("Barrett"), received his Bachelor's degree in education in 1997 and was subsequently certified to teach elementary education. In November 1998, Wells Elementary School ("Wells"), a Steubenville City School, hired Barrett as a substitute teacher. Beginning in January 1999, Barrett substituted for an eight-week term, taking the place of a first grade teacher on maternity leave. The principal at Wells, John Holub ("Holub"), then offered Barrett a substitute teaching position for the remainder of the school year to take the place of a fourth grade teacher on maternity leave. Barrett accepted the position with the hope of receiving a full-time teaching contract for the following school year.

In May 1999, Barrett was scheduled to be interviewed for a full-time teaching position with Steubenville City Schools. Prior to the interview, Holub advised Barrett that Richard Lucci ("Lucci"), who would be assuming the position of Superintendent during the next school year, would not give Barrett a teaching contract unless his son attended Steubenville City Schools. From the time that he was in kindergarten, Barrett's son had attended All Saints, a Catholic school. After Barrett's conversation with Holub, Barrett was interviewed by Steubenville City Schools administrators, including Lucci, then-Assistant Superintendent. Lucci asked Barrett where his son would be attending school the following year, and Barrett told him that his *969 son would finish the eighth grade next year at All Saints. After the interview, Barrett had another conversation with Holub, who again indicated that Lucci would not give Barrett a teaching contract until he moved his son out of All Saints and into Steubenville City Schools.

During the summer of 1999, two teaching positions became available. Barrett did not receive an offer for either position. In fact, a teacher who had not substituted with Steubenville City Schools was hired, despite a tradition within the school district to hire teachers who had previously substituted.

In August 1999, Barrett again interviewed with now Superintendent Lucci and informed him that his former job had recalled him back to work and he needed to make a decision. Barrett asked Lucci for a full-time teaching contract with Steubenville City Schools. Barrett

claims that Lucci told him, "I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." Barrett claims that he relied on this promise in declining to return to his full-time position with his former employer and instead served for another year as a substitute teacher.

During the 1999-2000 school year, Holub often expressed to Barrett Lucci's disapproval of Barrett's son attending private school. Barrett claims that in May 2000, Holub once again told Barrett that he would never receive a full-time teaching contract until he enrolled his son in Steubenville City Schools. Also in May 2000, Lucci informed Barrett that he should consider moving his son to public school for at least one year, insisting that Barrett's son would like it. Barrett claims that he was under such pressure, especially after turning down full-time employment with his former employer, that during the summer he enrolled his son in Steubenville High School for the 2000-01 school year. Even after he enrolled his son in Steubenville City Schools, Barrett was not offered teaching positions when they became available.

In August 2000, Barrett again went to speak with Lucci about his position. Lucci asked Barrett how his son felt about changing schools, and Barrett replied that his son was unhappy. Lucci informed Barrett that "it would be held against him" if his son did not attend Steubenville High School. Lucci also explained to Barrett that the school board liked for teachers to enroll their children in the public school system because it "looked good" to those parents whose children attended Steubenville City Schools. Lucci stated that if Barrett returned as a long-term substitute, then he would be given a full-time contract after his sixty-day period was complete. [FN1]

FN1. Steubenville City Schools had a policy or practice that granted full-time contracts to teachers who taught for at least sixty days in the same classroom. J.A. at 129.

Barrett began the 2000-01 school year as a full-time substitute teacher with the expectation that he would receive a full-time teaching contract. Barrett, however, reconsidered his decision regarding his son's education, removed him from Steubenville High School, and enrolled him in Catholic Central High School. On September 29, 2000, Barrett met with Lucci and the Assistant Superintendent. Barrett claims that Lucci told him that he was being removed from his position as a fourth grade substitute teacher at Wells. When Barrett questioned Lucci about the reason for his removal, Lucci told him that he was being disloyal. Lucci also expressed that he thought public high school would be better

for Barrett's son. Barrett then reminded Lucci of his agreement to grant him a full-time contract after Barrett completed his sixty days of teaching in *970 the classroom. Lucci became irate, denied ever making such a promise, and ordered Barrett to clean out his classroom that day.

Consequently, in June 2001, Barrett filed suit in the district court against Defendants-Appellants Steubenville City Schools, Superintendent Lucci, in his individual capacity, and Board Members Spahn, Bruzzese, Kerr, Hendricks, and Beal, in their official capacities only. Barrett asserted several claims, including: civil rights violations under 42 U.S.C. § 1983, religious discrimination under Ohio law, breach of contract, promissory estoppel, and tortious interference with present contractual relations or prospective contractual relations or both. Defendants filed a motion for summary judgment. The district court granted Defendants' motion as to Barrett's federal and state claims of religious discrimination and as to Barrett's claim of equal protection and free exercise of religion under 42 U.S.C. § 1983. The district court denied, however, defendants' motion as to Barrett's parental rights claim under § 1983 and the remaining state law claims. Defendants timely filed this appeal.

The only issue before us on appeal is whether Lucci is entitled to qualified immunity. In answering that question, we must determine whether the district court erred in finding that there is a clearly established constitutional right for parents to direct the education of their children and that Lucci's actions violated that right. For the reasons that follow, we find that the district court did not err in its conclusion.

II. DISCUSSION

A denial of summary judgment is ordinarily not a final judgment and therefore not reviewable on appeal. Hoover v. Radabaugh, 307 F.3d 460, 465 (6th Cir.2002). The present case, however, involves a decision by the district court to deny qualified immunity to a public official accused of violating plaintiff's constitutional rights. "[D]istrict court denials of qualified immunity may be appealed as collateral orders where (1) the defendant is a public official asserting the defense of qualified immunity, and (2) the issue appealed concerns not which facts the parties might be able to prove, but whether certain alleged facts reflect a violation of clearly established law." Id. (citations omitted). Because Defendants are not challenging the facts but rather claim that they did not violate the law, the jurisdictional requirements are met in the present case.

[1] [2] [3] [4] Whether qualified immunity applies to an official's actions is a question of law that this court reviews de novo. Virgili v. Gilbert, 272 F.3d 391, 392 (6th Cir.2001). Qualified immunity is an

affirmative defense that shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Once the defense is raised, the plaintiff bears the burden of showing that the defendant's conduct violated a right so clearly established that a reasonable official in that position would have clearly understood that he or she was under an affirmative duty to refrain from such conduct. Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir.1992). The plaintiff, thus, bears the ultimate burden of proof to show that the defendant is not entitled to qualified immunity. Wegener v. Covington, 933 F.2d 390, 392 (6th Cir.1991). On appeal, in viewing the facts in favor of the plaintiff, we must decide first whether a constitutional violation occurred and second whether that right was clearly established. Hoover, 307 F.3d at 465.

*971 A. Violation of Constitutional Right

[5] "To state a cause of action under § 1983, a plaintiff must allege the deprivation of a right secured by the United States Constitution or a federal statute by a person who was acting under color of state law." Spadafore v. Gardner, 330 F.3d 849, 852 (6th Cir.2003). In this case, Barrett has filed a complaint where the first claim for relief is entitled "Violation of Civil Rights, 42 U.S.C. § 1983." Second Amended Complaint ¶ 10. In his complaint, under this particular claim, Barrett alleged that he was told by Defendant Lucci "that the school board wanted the children of its teachers enrolled in Steubenville City schools." Id. Barrett alleged that Holub told him that "Lucci was impressed with Plaintiff Patrick Barrett's qualifications but that he would not be hired for a full-time position because Plaintiff's son attended a Catholic school." Id. ¶ 8. Barrett also alleged that he was denied full-time teaching positions while his son was enrolled in private school, but once he enrolled his son in Steubenville City Schools, Lucci promised him a full-time contract. Id. ¶ 12. Finally, Barrett alleged that, after Barrett removed his son from public school and re-enrolled him in private school, Lucci terminated Barrett for being disloyal. Id. ¶ 13. After citing the factual allegations, Barrett then indicated that the Defendants deprived him of not only his First Amendment right to freedom of religion, but also of "equal protection under the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶ 14.

Appellants argue that these allegations and legal assertions are insufficient to show a violation of Barrett's constitutional right to direct the education of his child. To support their argument, Appellants cite our

recent decision in Spadafore v. Gardner. In Spadafore, we reviewed a dismissal of § 1983 claims against defendants in their individual capacity. 330 F.3d at 852. We found that the plaintiffs' claims of § 1983 violations "were not adequately set forth in their complaint." Id. at 853. In so finding, we noted that "nowhere in the complaint [wa]s § 1983 specifically invoked against the individual defendants." Id. at 852. We also indicated that "[f]rom the language of the complaint, one cannot ascertain which substantive constitutional rights were allegedly violated. Nor was this clarified in the [plaintiffs'] response to the defendants' motion for summary judgment." Id. at 853.

[6] Here, the facts are clearly distinguishable. First, Barrett provided a detailed description of the alleged violations. He asserted that Lucci not only conditioned his full-time employment on where his son attended school, but also terminated him once his son was removed from public school. Barrett specifically pleaded these allegations under the claim for § 1983 violations. Additionally, unlike the plaintiff in Spadafore. Barrett clarified any possible confusion in his response to Defendants' motion for summary judgment. [FN2] We, therefore, find that the facts as alleged by Barrett set forth a claim that Lucci violated his constitutional right to rear his child.

FN2. In Plaintiff's Memorandum Contra Defendants' Motion for Summary Judgment, the first argument heading is entitled "Material Issues of Fact Exist as to Plaintiff's § 1983 Claim of Infringement of His Fundamental Right in the Rearing of His Child as Protected by the Equal Protection Clause and the First Amendment Free Exercise Clause." J.A. at 135.

B. Constitutional Right Clearly Established

Once we have found a violation of a constitutional right under the plaintiff's *972 facts, we must then determine if that right was clearly established. Hoover, 307 F.3d at 465. We look to whether a reasonable official would understand that his actions violated that right. Id. at 468. This court has emphasized that "to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir.1988). In an extraordinary case, decisions of other circuits may be used to clearly establish a principle of law if they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on

constitutional grounds, would be found wanting." Id. A few admittedly novel opinions from other circuit or district courts are not enough to form the basis for a clearly established constitutional right in the Sixth Circuit. Id.

[7] Here, the district court correctly determined that the right to direct the education of one's child was clearly established. Both the Supreme Court and this court have repeatedly recognized that parents have a fundamental right to raise their children, including directing their children's education. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (recognizing the right of "the parent to give his children education suitable to their station in life"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (striking down state law that required parents to send their children to a public school for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Zelman v. Simmons-Harris, 536 U.S. 639, 680 n. 5, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring) (emphasizing that "[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"); Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419, 422 (6th Cir.1996) (recognizing that because parents have a constitutional right "to direct their children's education," organization has standing to bring claim on behalf of parents); Johnson v. City of Cincinnati, 310 F.3d 484, 489 (6th Cir.2002) (stressing that "[b]oth Supreme Court precedent and our national tradition suggest that a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution"). More specifically, the Supreme Court has also indicated that "parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction ...." Runyon v. McCrary, 427 U.S. 160, 178, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Thus, it is clearly established that parents have a fundamental right to direct the education of their children.

That Barrett has the fundamental right to educate and raise his children, in and of itself, does not provide Lucci with clearly established law that his actions violated this right. There is, however, precedent from both the Supreme Court and the Sixth Circuit that makes clear that Lucci's actions violated Barrett's fundamental parental right. In Perry v. Sindermann, the Supreme Court found unconstitutional the nonrenewal of a teaching contract on the *973 basis of a teacher's exercise of a constitutionally protected interest. 408 U.S. 593, 597, 92 S.Ct. 2694, 33

L.Ed.2d 570 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). We have decided several cases applying the principle of law set forth in Perry. In Littlejohn v. Rose, we found that the refusal to rehire a non-tenured teacher violated the constitutionally protected right of privacy if such denial was based on the teacher's divorce. 768 F.2d 765, 769-70 (6th Cir.1985) ("It is clear from the Supreme Court's analysis in Perry that a person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty constitutes an impermissible reason for denying employment."). In Adkins v. Board of Education of Magoffin County, Kentucky, plaintiff was denied employment with a school board simply because of her marriage to a person who her employer disliked. 982 F.2d 952 (1993). In finding that the district court erred in granting defendants' motion to dismiss, we specifically stated that "[w]hile the plaintiff had no contractual right to a job, she could not be deprived of her public employment for exercising a constitutional right." Id. at 955. Similarly, in Montgomery v. Carr, we found that "[i]f the only motivation for a public official in taking some adverse employment action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." 101 F.3d 1117, 1127 (1996). Therefore, based on precedent specific to this court, the government cannot deny someone employment simply because that person is exercising his fundamentally protected right. [FN3]

FN3. The dissent argues that a "public employer can insist that employees waive certain rights," dissent at 975, and summarizes the ultimate holding of this court in Montgomery to support its assertion, id. (noting that "this court upheld a school district's anti-nepotism policy, which required the transfer of one employee because that employee was married to another employee, despite the right to marry"). While our ultimate holding in Montgomery found that there were legitimate reasons for a school's anti-nepotism policy, the dissent overlooks the court's language marking as unconstitutional a public employer's adverse employment action based only on a protected right. Here, we have just that. Unlike the case in Montgomery, we are not deciding this case on the merits; in viewing the facts in favor of Barrett, he was denied employment only because he was exercising his right to educate his son in a manner of his choice.

[8] In this case, Barrett made a decision to send his son to private school. Barrett's choice in directing his son's education is activity shielded by his constitutionally protected right of liberty. The Defendants

do not dispute that. Because it has been clearly established that one's involvement in constitutionally protected activity cannot be the sole basis for denying public employment, any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law.

Nevertheless, Defendants argue that "[t]here is no clearly established line of cases out of the Supreme Court or this Circuit which establish that dictating where public school employees send their children to school violates the employees' parental rights." Appellants' Br. 13. Defendants would have us find that the district court erred by relying on other circuits in its analysis. [FN4] The cases referenced *974 by the district court point unmistakably to the unconstitutionality of the conduct complained of and are clearly foreshadowed by applicable direct authority in the Supreme Court. See, e.g., Pierce, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Perry, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570. While it was therefore permissible for the district court to rely on these cases in finding that the law was clearly established, it was unnecessary. We do not adopt the district court's analysis, [FN5] for we need not rely on law outside of our jurisdiction to find that a clearly established right exists.

FN4. In its opinion, the district court cited precedent from the

Fifth and Eleventh Circuits to support the proposition that dictating where an employee of the school district can send his child to school infringes on the familial rights of that teacher. See Fyfe v. Curlee, 902 F.2d 401, 403 (5th Cir.1990) (holding that retaliation against a school employee who placed her child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court"); Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479 (11th Cir.1984) (holding that a school board policy prohibiting employees from sending their children to private schools interfered with employees' constitutional right to control the education of their children).

FN5. "We may affirm a decision of the district court if correct for any reason, including one not considered below." U.S. Postal Serv. v. Nat'l Ass'n. of Letter Carriers, AFL-CIO, 330 F.3d 747, 750 (6th Cir.2003).

The Supreme Court has instructed that qualified immunity does not require "the very action in question [to] ha[ve] previously been held

unlawful," but rather "in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (emphasis added). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to his child to a private school. [FN6] As aforementioned, Barrett has a constitutionally protected fundamental right to educate his child at the school of his choice. There is also a clearly established law that forbids employers from denying one employment based only on "person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty." Adkins, 982 F.2d at 955 (citing Littlejohn, 768 F.2d at 769-70). In accordance with these fundamental principles of law, Lucci cannot obtain qualified immunity by claiming that no clearly established right existed.

FN6. This court has, in fact, addressed this issue. See Janes v. Bardstown City Sch. Bd. of Educ., 97 F.3d 1452, 1996 WL 536794 (6th Cir. Sept.20, 1996). In Janes, a teacher sued the public school system alleging that she was not considered for a teaching position because her children attended parochial schools. We held that summary judgment was not warranted when there are facts in dispute as to whether "defendants violated Mrs. Janes' federal constitutional right to direct the education of her children." Id. at *1.

III. CONCLUSION

In sum, we reiterate that parents have a constitutionally protected liberty interest in raising and directing the education of their children. A state employer cannot condition employment upon the waiver of that right. For these reasons, we AFFIRM the judgment of the district court in denying Lucci qualified immunity.

ROGERS, Circuit Judge, dissenting.

Qualified immunity protects the private funds of an official sued in his individual capacity for actions that have not been clearly established to be unconstitutional, even if the actions are later determined

indeed to have been unconstitutional. Even assuming that the termination of a *975 public school teacher for not sending his children to the public schools is unconstitutional, [FN1] it is not clearly established to be unconstitutional. This is because the legal conclusion results from a balance that has not been definitively made by the Supreme Court, the Sixth Circuit, or even by federal courts in general.

FN1. Although, for purposes of this dissent, I assume that Barrett's termination was unconstitutional, this is not necessarily the case. If this court were to apply a test similar to that applied in Montgomery v. Carr, 101 F.3d 1117 (6th Cir.1996), a case addressing an anti-nepotism policy and the right to marry, this court could conclude that only rational basis scrutiny was warranted for Barrett's claim. See id. at 1124-29. And under a rational basis analysis, the government's interest in eliminating the inference that public schools are of lesser quality than private schools, an inference that can be drawn when a public school teacher sends his child to private school, may be sufficient to justify the requirement imposed on Barrett.

The majority concludes that "any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law." And yet, such a right has not been articulated in the Supreme Court or this circuit. Rather, the majority constructs this right from the parts of two others: the fundamental right of a parent to raise his or her children and direct their education, which is clearly established, and a right the majority describes as a right not to be denied government employment because of a decision to exercise a fundamentally protected right. This second "right" is not a right in all contexts, and has certainly not been clearly established in the context presented by this case.

Public employees can be required to give up some of their constitutional rights, although certainly not all of them. The public employer can insist that employees waive certain rights, but cannot insist that employees waive others. It is concededly clearly established that public employers cannot require their employees to vote a certain way, to go to religious services, or to do a number of other things that are unrelated to the public employment. This explains the cases relied upon by the majority, such as Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (public criticism of college's board of regents), Littlejohn v. Rose, 768 F.2d 765 (6th Cir.1985) (divorce), and Adkins v. Board of Education, 982 F.2d 952 (6th Cir.1993) (marriage to a particular person). On the other hand, public employers can require

employees to give up some constitutional rights, such as the right to read the newspaper all day, or the right to proselytize all day, where the restriction is sufficiently related to the purpose of the employment. For instance, in Montgomery v. Carr, 101 F.3d 1117 (6th Cir.1996), a case relied upon by the majority opinion, this court upheld a school district's anti-nepotism policy, which required the transfer of one employee because that employee was married to another employee, despite the right to marry. And in Flaskamp v. Dearborn Public Schools, 385 F.3d 935 (6th Cir.2004), this court upheld a school board's decision to deny tenure to a teacher who had a relationship with a student, despite the right to intimate association.

Telling a teacher where his child may go to school may fall somewhere in between. Just the two clearly established propositions, (1) that parents have a right to send their children to nonpublic schools and (2) that public employers cannot make employees give up all their constitutional rights, do not, even together, clearly establish the conclusion (3) that public school employers cannot require teachers to put their own children in the public schools. Conclusion (3) may result from a careful *976 examining and balancing of the interests in (1) with the need of schools to have teachers demonstrate commitment to the public schools, but it cannot be said that such a conclusion is clearly established.

Under the proper test, in order for a right to be considered clearly established, it must be " 'so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.' " Akers v. McGinnis, 352 F.3d 1030, 1042 (6th Cir.2003) (quoting Dominque v. Telb, 831 F.2d 673, 676 (6th Cir.1987)). Or, as this court has said elsewhere, " '[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.' " Saylor v. Bd. of Educ., 118 F.3d 507, 515 (6th Cir.1997) (emphasis in original) (quoting Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1150 (11th Cir.1994) (en banc)). On the facts of this case, it is not clear that "every like-situated, reasonable government agent" would have clearly understood that the right to direct the education of one's children should be combined with a balancing test used to determine what rights a public employer can require a public employee to give up, with the result that a public school can not require a public school teacher to send his or her child to that public school. Accordingly, Superintendent Lucci should be accorded qualified immunity in this case.

APPENDIX B

97 F.3d 1452 (Table), 1996 WL 536794 (6th Cir.(Ky.))
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Joyce Brooks JANES, Plaintiff-Appellant,

v.

BARDSTOWN CITY SCHOOLS BOARD OF EDUCATION et al., Defendants-Appellees.

No. 95-5531.

Sept. 20, 1996.

On Appeal from the United States District Court for the Western District of Kentucky, No. 93-00349; John G. Heyburn, II, Judge.

W.D.Ky.

VACATED IN PART, AFFIRMED IN PART.

Before: GUY, NELSON, and BATCHELDER, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

**1 This is an appeal from a judgment for the defendants in an employment discrimination case. The plaintiff, Joyce Brooks Janes, alleges in her complaint that she was denied consideration for appointment to a teaching position in the public school system of Bardstown, Kentucky, because she sent her children to parochial schools and not to the Bardstown public schools. The complaint asserts that in so excluding her from consideration, the defendants--the public school system's board of education, the individual members of the board, and the system's superintendent and assistant superintendent--infringed upon the exercise of her right to "familial privacy," among other things, in violation of 42 U.S.C. §§ 1983 and in violation of Kentucky law. As amended, the complaint also asserts claims of age discrimination under §§ 1983 and under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§§§ 621 *et seq.*, as well as a claim of religion-based discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§§§ 2000e *et seq.*

The district court dismissed the age discrimination claim for failure to exhaust administrative remedies; granted summary judgment to the defendants on the other federal claims; and dismissed the pendent state claims without prejudice. We conclude that a genuine issue of material fact is presented with respect to the claim that the defendants violated Mrs. Janes' federal constitutional right to direct the education of her children. We shall vacate the district court's judgment insofar as that claim and the pendent state claims are concerned, while affirming the rest of the judgment.

I

In June of 1992 Mrs. Janes applied for a job as an elementary school music teacher in the Bardstown city schools. Mrs. Janes, a Roman Catholic, had been teaching music for six years in the Catholic school system. She had previously taught music in the public schools. All of Mrs. Janes' school-aged children were enrolled in the parochial schools at the time she applied for the job in question here.

Bardstown's assistant school superintendent, defendant Patrick Hagan, reviewed some 19 applications that had been submitted for the vacant position in the music department. Dr. Hagan forwarded the names of five applicants--not including Mrs. Janes'--to the elementary school principal, Merrylen Sparks. After interviewing four of the applicants (the fifth had withdrawn), Ms. Sparks selected a woman named Jennifer Beaver for the job. Ms. Beaver had been teaching for about one year, and none of the other people interviewed had much more teaching experience than Ms. Beaver did.

After learning that she was not to be hired, Mrs. Janes had a meeting with Dr. Hagan. According to an affidavit subsequently filed by Mrs. Janes with the Equal Employment Opportunity Commission, Dr. Hagan (who, like Mrs. Janes, is a Roman Catholic) first told her that she had not been granted an interview because she was overqualified for the position. Later in the conversation, according to Mrs. Janes, Dr. Hagan said this: "May I be perfectly blunt? You were not granted an interview because your children attend the parochial school system and, if you do not think our system is good enough for your children, you have no right to teach here." Dr. Hagan allegedly went on to say that no teachers with children in parochial schools "have been hired in the last five to six years because I've seen to it." **2 Dr. Hagan recounts the conversation somewhat differently. When Mrs. Janes asserted that she was the most qualified person for the job, according to Dr. Hagan, he told her that her experience was not an advantage. Because of her many years of teaching, he explained, the school district would have to pay her much more than it would have to pay a less experienced applicant. He also suggested that less experienced teachers could adapt more easily to Kentucky's recent educational "reforms." A further disadvantage cited by Dr. Hagan was that Mrs. Janes' private school teaching experience would not transfer well to a public setting. "Even her experience as a parent," Dr. Hagan added, "was all private." Dr. Hagan did not recall having made the statements that Mrs. Janes attributed to him about disqualification by reason of parochial school patronage.

We must take it as given that parents have a constitutional right to send their children to private schools. See *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925), where the Supreme Court characterized as "entirely plain" a constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children under their control." *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972). And established precedent teaches that a state may not ordinarily condition the exercise of this right upon the surrender of an opportunity for public employment. See *Fyfe v. Curlee,* 902 F.2d 401, 403 (5th Cir.) (retaliation against school employee who placed child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court"), *cert. denied,* 498 U.S. 940 (1990), and *Stough v. Crenshaw County Bd. of Educ.,* 744 F.2d 1479 (11th Cir.1984) (school board policy prohibiting employees from sending children to private schools interferes with employees' exercise of their constitutional right to control the education of their children). See also *Perry v. Sindermann,* 408 U.S. 593 (1972) (nonrenewal of teaching contract because of teacher's exercise of First Amendment rights violates the Constitution), and *Littlejohn v. Rose,* 768 F.2d 765 (6th Cir.1985) (refusal to rehire non-tenured teacher would violate constitutionally protected right of privacy if based on teacher's divorce), *cert. denied,* 475 U.S. 1045 (1986).

Here the district court justified its summary disposition of Mrs. Janes' §§ 1983 parental rights claim on the ground that the decision to hire a less experienced person was unquestionably economic in nature, there being no dispute that the board made it a practice to hire only persons with less than three years' experience. Upon *de novo* review of the record, however, we conclude that there is a genuine issue of fact as to the reason Mrs. Janes was not considered for the job.

The plaintiff's affidavit clearly supports an inference that she was deemed disqualified because she did not send her children to the public schools. And Mrs. Janes' statements are corroborated by an affidavit from one Lynn Bowling. Ms. Bowling states that Dr. Hagan told her, anent Mrs. Janes, that the school had an unwritten policy of not hiring people who sent their children to other school systems. An

affidavit executed by Linda Dickerson, a substitute aide in the Bardstown school system, also lends credence to Mrs. Janes' assertions. Ms. Dickerson states that when she sought a full-time teacher's aide position, Dr. Hagan told her that because her children attended parochial schools he could not help her obtain the position.

**3 It is true that if the school system actually did have a fixed policy against hiring anyone with more than three years' experience, the failure to hire Mrs. Janes could not have been "caused" by the exercise of her constitutionally protected familial rights. In that event her claim would fail regardless of what Dr. Hagan might have said to her. See *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 286-287 (1977). We do not believe, however, that the defendants have set forth sufficient evidence of such a policy to warrant summary judgment.

Mrs. Sparks stated that "usually" the school hired those "on the lower end of the ... salary scale." Defendant Robert Smotherman, the school superintendent, characterized lengthy teaching experience as a consideration "of major importance," but not the only consideration. Dr. Hagan stated that 71 percent of those hired in the last several years had no more than three years' experience. The evidence, as we read it, demonstrates only a preference for less expensive teachers, and not a firm bar to the hiring of more expensive teachers.

Nor does the statistical evidence relied upon by the defendants conclusively disprove Mrs. Janes' claim of impermissible discrimination. The statistics show that a large percentage of the public school employees are Catholics and that a number of the system's teachers send their children to parochial schools. What is not clear from the record, however, is how many of the applicants hired since Dr. Hagan's alleged policy supposedly went into effect were sending their children to parochial schools at the time they were hired.

The defendants assert that between June 1, 1991, and October 15, 1992 (the period deemed relevant for purposes of Mrs. Janes' EEOC complaint), the district hired 34 individuals; that 16 of the 34 were Catholic; that 5 of the 16 Catholics had school-age children; and that 4 of these sent their children to parochial schools. The plaintiff,

however, denies that one of these employees--Joey Downs--had his children in parochial schools at the time he was hired. Of the other three employees, she says that one was a cafeteria worker, one was a bus driver, and only one was a school teacher. If only one successful applicant for a teaching position had children in the parochial schools when she was hired, it does not seem to us that the statistics are all that helpful to the defendants.

III

Title VII makes it unlawful for an employer "to fail or refuse to hire ... any individual ... because of such individual's ... religion...." 42 U.S.C. §§ 2000e-2. The statute likewise makes it unlawful to "limit, segregate, or classify ... applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's ... religion...." *Id.*

We agree with the district court that there is no evidence here that the Bardstown school system had a practice of discriminating against Catholics. On the contrary, the record reveals that 40 percent of the system's employees are Catholics and that 48 percent of those hired between June 1, 1991, and October 15, 1992, are Catholics. Nor is there any evidence that Mrs. Janes individually was discriminated against because of her Catholic faith. Accepting the affidavits presented by Mrs. Janes at face value, they tend to show only that Bardstown school system excluded her from consideration because she sent her children to school elsewhere--not because she is a Catholic.

**4 It is true that Title VII defines religion broadly, extending protection to "all aspects of religious observance and practice, as well as belief...." 42 U.S.C. §§ 2000e(j). But the record before us does not demonstrate that in sending her children to parochial schools Mrs. Janes was engaging in the type of "observance or practice" entitled to protection under the Act. Neither does the record show that she was motivated by religious belief. She has presented no evidence that her faith calls upon her to patronize parochial schools. She and her husband may have made the choice they did for the purpose of obtaining a religious education for their children, as alleged in paragraph 11 of the verified complaint, but a preference for such an

education need not itself be an aspect of religious observance, practice, or belief.

IV

The court dismissed the ADEA claim on the ground that Mrs. Janes had not exhausted her administrative remedies. Under 29 U.S.C. §§ 626(d) a complaint must be filed with the EEOC within 180 days of an unlawful practice (or with the state agency within 300 days) in order to maintain a private action under the ADEA. Mrs. Janes did not complain of age discrimination to the EEOC during the applicable time period. There are no grounds for equitable tolling of the requirement, and the dismissal of the ADEA claim was proper.

Mrs. Janes may not bring her ADEA claim under §§ 1983. The detailed statutory remedy created by the ADEA constitutes the exclusive means for enforcement of the Act. See *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364, 1366-69 (4th Cir.), *cert. denied,* 493 U.S. 850 (1989).

V

The defendant board of education argues that it should be dismissed because it is not responsible for the actions of its employees and because it is entitled to Eleventh Amendment immunity.

For a school board to be found liable for the acts of an employee under §§ 1983, the acts of the employee must have been "in accordance with some official policy or custom of the board." *Kitchen v. Chippewa Valley Schs.,* 825 F.2d 1004, 1013 (6th Cir.1987), citing *Monell v. Department of Social Servs.,* 436 U.S. 658, 690-91 (1978). The district court did not reach the issue of whether such a policy or custom could be said to exist here, and we decline to decide the issue for the first time on appeal.

Similarly, we decline to decide for the first time on appeal the school board's entitlement to Eleventh Amendment immunity. The resolution of this question requires a fact-based inquiry into the structure of the Kentucky educational system, and it would be inappropriate for a court of appeals to make such a determination in

the first instance. See *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299 (6th Cir.1984), *cert. denied,* 469 U.S. 1113 (1985). We note, however, that three different federal district judges in Kentucky have examined the Kentucky educational scheme and concluded that school boards are not entitled to Eleventh Amendment immunity as agencies of the state. *Doe v. Knox County Bd. of Educ.,* 918 F.Supp. 181 (E.D.Ky.1996) (Coffman, J.); *Tolliver v. Harlan County Bd. of Educ.,* 887 F.Supp. 144 (E.D.Ky.1995) (Bertelsman, J.); *Blackburn v. Floyd County Bd. of Educ.,* 749 F.Supp. 159 (E.D.Ky.1990) (Hood, J.).

VI

**5 Because we have kept the plaintiff's action alive in regard to one of her federal claims, we must vacate the dismissal of the pendent state claims. On remand the district court may consider whether jurisdiction over those claims is appropriate in light of our decision here.

The dismissal of the plaintiff's claim for interference with her right to direct and control the education of her children and her pendent state claims is VACATED, and the case is REMANDED for further proceedings with respect to those claims. The district court's disposition of the remaining claims asserted by the plaintiff is AFFIRMED.

RALPH B. GUY, Jr., Circuit Judge, concurring in part and dissenting in part.

I concur in all of the court's opinion except its conclusion that plaintiff's §§ 1983 cause of action should be remanded for further proceedings.

Although plaintiff asserts multiple theories of action, this is a failure to hire case. Plaintiff claims she was not hired because her children attend parochial school. The defendants counter by claiming that she was not hired because another teacher who could do the job

equally well was hired at a lesser cost. As I view this record, plaintiff has failed to demonstrate that if allowed to go to trial she could prove the defendants' proffered reason for not hiring her was pretextual. Unless she can get over this hurdle, it is unnecessary to consider her constitutional theories. I would affirm the decision of the district court in its entirety.

C.A.6 (Ky.),1996.

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No. 04-1409

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In the Supreme Court of the United States

STEUBENVILLE CITY SCHOOLS; RICHARD LUCCI; DANIEL SPAHN; RUTH ANN BRUZZESE; WILLIAM KERR; WILLIAM HENDRICKS; RICHARD BEAL,
Petitioners,

v.

PATRICK BARRETT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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I. Respondent Has Not Demonstrated That the Sixth Circuit's Decision Does Not Conflict with the Decisions of the Fifth and Eleventh Circuit, and of this Court, All of Which Recognize That a Balancing Test Applies to the Question Whether a Constitutional Right Is Clearly Established.

The basis for the Sixth Circuit's decision below was the court's finding that (1) Respondent has alleged a violation of a constitutionally or statutorily protected right, and (2) the right was clearly established in the law such that a reasonable government official would have realized that his or her action was in violation of that right. See, Appendix B, 11a-16a. The Sixth Circuit did not employ the balancing test that this Court, the Fifth Circuit and the Eleventh Circuit have employed when passing on the constitutional rights of public employees. *See, Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984).

Respondent takes the position that each of the above cases was decided on its merits, and not at the summary judgment stage, and therefore none apply to the present inquiry. Respondent misses the thrust of Petitioner's argument. While the matter at hand was decided at the summary judgment stage, the Petition is directed to the narrow question whether a public official is entitled to qualified immunity. This narrow question requires a Court to decide "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether the right in question was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999), citing *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999).

Thus, the "clearly established" inquiry requires an analysis of the substantive law giving rise to the constitutional right in question. While the Sixth Circuit was not required to decide this case on its merits, the Court was required to take into consideration the substantive law surrounding its two guiding principles that (1) parents have a fundamental right to raise their children and (2) one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. *Id.*

In engaging in this inquiry, the Sixth Circuit made the blanket generalization that one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. However, courts addressing the question whether it is unlawful to deny public employment based upon the decision to send one's child to private school have all employed a balancing test. *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984).[1] As such, the Sixth Circuit's inquiry into the substantive law that speaks to the question whether the right in question in clearly established should have taken into account the balancing test employed by other Circuits.[2]

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[1] Following the alleged violation of Respondent's rights, the Fifth Circuit decided another case consistent with its holdings in *Fyfe* and *Brantley*. *See*, *Barrow v. Greenville Independent School Dist.*, 332 F.3d 844 (5th Cir. 2003).

[2] With reference to the balancing test in question, Respondent contends that Petitioners have never contended that they had a countervailing interest in not hiring Respondent. (See, Part III, Response to Petition). Respondent misses the point. The Petition centers around the narrow question whether Petitioner Lucci is entitled to qualified immunity, not the merits of the case.

Had it done so, the Court would have been forced to acknowledge that its conclusion, that one's participation in constitutionally protected activity cannot be the sole basis for denying public employment, was overly broad. The above cases clearly stand for the proposition that, in the specific context of denying public employment based upon the decision to send one's child to private school, a balancing test applies. Therefore, there are instances in which terminating public employment based upon the decision to send one's child to private school may be constitutional. This balancing test applies in the summary judgment phase as well as the trial phase. There is no basis for Respondent's argument that the controlling law should not be applied at the summary judgment phase in the qualified immunity context. In short, Respondent has not provided this Court with a compelling reason why the Sixth Circuit was justified in over looking the balancing test that this Court, and other Circuits, have applied.

II. Respondent Has Not Demonstrated That a Reasonable Public Official in the Absence of Sixth Circuit and Supreme Court Precedent, Can Reasonably Be Expected to Know That Two Complicated Constitutional Principles, Combined with a Complex Legal Balancing Test, Place Him on Notice That His Conduct May Be Unlawful.

As the Petition for Writ of Certiorari underscores, application of the Sixth Circuit's analysis below, presents for review the question whether the general principle that (1) a

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Petitioners have maintained throughout this litigation that, because a school district may have the right not to hire a teacher whose child attends private school, and because a balancing test must be employed to determine the question, it is inequitable to expect Petitioner Lucci to properly weigh the legal interests at issue.

parent has the right to direct his child's education, coupled with the general principle that (2) public employment cannot usually be denied based upon the employee's exercise of constitutional rights, require a reasonable public official to reach the conclusion that (3) a public school cannot require that it's employees enroll their children in the public schools. This analysis must be conducted while mindful of the fact that there is no Sixth Circuit precedent directly addressing the question whether a public school can require that it's employees enroll their children in the public schools, and that there is no Supreme Court precedent answering the same question.

As argued in the Petition, the Sixth Circuit's conclusions about the state of the law represent over-generalizations of constitutional principles. *See*, *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (recognizing that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State). *Kelley v. Johnson,* 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976) (upholding police regulations relative to length of a police officer's hair and other personal grooming matters, despite the freedom of expression); and *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714, 135 L Ed. 2d 834, 116 S. Ct. 2353 (1996), (further citations omitted), (recognizing that government officials may discharge public employees for refusing to support a political party or its candidates if political affiliation is a reasonably appropriate requirement for job in question).

Respondent does not provide to this Court any substantive response to the above cited precedent. Rather, Respondent relies upon the case law cited by the Sixth Circuit below in

support of its broad generalizations of constitutional principles. Aside from re-hashing those cases, Respondent makes no substantive attempt to demonstrate that the Sixth Circuit's decision was not an over-generalization of the law, especially in light of the *Yoder*, *Kelley* and *O'Hare* cases.

Respondent simply argues that precedent in the Sixth Circuit has put the issue to rest, citing the unpublished case of *Janes v. Bardstown City Sch. Bd. of Ed.*, 97 F.3d 1452, 1996 U.S. App. LEXIS 24997 (6th Cir. 1996). Respondent does not respond to Petitioner's citation to the Sixth Circuit's own rules, which state that reliance upon unpublished opinions is "disfavored" by Sixth Circuit, except for the limited purposes of establishing *res judicata*, estoppel, or the law of the case. See, 6 Cir. R. 28(g). Further, the *Janes* case involved a religious discrimination claim, not a parental rights claim. Respondent cannot rely on *Janes* as notice to Petitioner Lucci that his conduct might violate Respondent's parental rights.

Given the lack of relevant precedent, the Sixth Circuit's error below is apparent upon review of this Court's decision in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In *Anderson*, this Court explained that what "clearly established" means depends largely "upon the level of generality at which the relevant 'legal rule' is to be established." 483 U.S. at 639. "Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The right allegedly violated must be defined at the appropriate level of specificity before a Court can determine if it was clearly established. *Id.* at 641. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, ***not as a broad general proposition*** * * * ." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272. (Emphasis supplied). If the

law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based upon qualified immunity is appropriate. 533 U.S. at 202, citing *Malley*, *supra*, 475 U.S. at 341.

The applicable passage from *Anderson* highlights the error of the Sixth Circuit's decision below, as the *Anderson* Court explains that general principles of law, such as those employed by the Sixth Circuit, cannot form the basis for the finding of a clearly established right:

> * * * if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Respondents would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity to a rule of pleading. * * * It should not be surprising, therefore, that our cases establish that the right that the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

483 U.S. 635, 639-640, 107 S. Ct. at 3038-39.

In response to the above precedent, Respondent notes that *Anderson* also stands for the proposition that "the very action in question" need not have been ruled unconstitutional in order to place a reasonable public official on notice as to the unconstitutionality of his actions. While this is certainly true, *Anderson* clearly stands for the proposition that a reasonable public official must have fair notice that his action violates the

constitution. While the "very action in question" need not have been decided, this Court emphasized in *Saucier* and *Anderson* that broad general propositions cannot serve as the basis for personal liability on the part of a public official. The contours of the right in question must be sufficiently clear, such that reasonable public official is on notice that his conduct violates the right in question in this case. But the Sixth Circuit could not point to the contours of the right in question. It only cited to general propositions of law, and charged Petitioner with knowledge of same. To act at this level of generality abandons the "objective legal reasonableness" that is "the touchstone" of *Harlow*.

Further examination of this Court's precedent reveals support for Petitioner's position. In finding that a right in question is not clearly established, this Court has previously been persuaded by the fact that "the constitutional question presented by [the] case is by no means open and shut." *Wilson, supra.*, 526 U.S. 615. In *Wilson* this Court examined, *inter alia*, whether it was obvious from the general principles of the Fourth Amendment that the conduct of the defendant police officers in *Wilson* violated the Fourth Amendment. *Id.* at 615-16. The *Wilson* Court noted that, at the time of the alleged violation, there were no judicial opinions holding the practice in question to be unlawful. *Id.* at 616. The *Wilson* Court concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. The same analysis applies in the case at bar. If there is no precedent on point in the Sixth Circuit, and federal judges in other Circuits must employ a constitutional balancing test to decide cases such as this on their merits, it is unfair to subject a school superintendent to money damages for picking the losing side.

With reference to the above *Wilson* factors, Respondent misconstrues Petitioners' reliance on *Wilson* as an argument that Petitioner Lucci was not on notice that his actions were unconstitutional because, in Respondent's words, "there are no two judicial opinions holding the practice in question to be unlawful." Respondent's argument is based upon a misunderstanding of Petitioners' contention. The question is not whether there are two judicial opinions holding the practice in question to be unlawful. The question is whether the state of the law is such that Petitioner Lucci was fairly on notice that his conduct violated Respondent's rights. Respondent cannot present to this Court a compelling reason why this question should be answered in the affirmative.

III. Respondent Has Not Demonstrated That, for the Purposes of a Qualified Immunity Inquiry in the Context of an Action Brought under 42 U.S.C. § 1983, a Plaintiff Can Fairly Be Said to Have Alleged a Violation of a Constitutionally or Statutorily Protected Right Where That Right Is Not Asserted in the Complaint and Where Plaintiff Only Makes Passing Reference to the Right in a Reply Brief Filed in Opposition to a Motion for Summary Judgment.

Respondent takes the position that he has satisfied the first prong of the qualified immunity inquiry by alleging, through a passing reference in a brief, a claim for violation of his constitutional right to raise his child. Respondent claims that this approach to holding Petitioner Lucci liable for money damages is acceptable because it did not subject Petitioner to "undue prejudice." After months of discovery, numerous depositions, discovery closure and the filing of a motion for summary judgment, Respondent was able to add a claim at the summary judgment stage. This addition of a claim now subjects Petitioner Lucci to personal liability for a cause of